> the Property Appraiser must allow access pursuant to Florida law, without further restriction. Nothing about the claims in the Complaint arise out of federal law in general or the Copyright Act in particular.

The Copyright Act provides that the federal government may not assert copyright in its records. 17 U.S.C. §105. The Act does not speak directly to the enforcement of copyright in records created by state governments. Skinner correctly asserts that the silence of the Copyright Act leaves available copyright protection for state records. But what Skinner fails to appreciate is that the decision whether to assert copyright protection in state records is a question of state law. *See, e.g., County of Suffolk, New York v. First American Real Estate Solutions,* 261 F.3d 179, 188 (2nd Cir. 2001) (hereafter *Suffolk County*) (holding "[t]hus, although a state and its subdivisions may own a copyright as a matter of copyright law, it may be that Suffolk County is not permitted to do so in this instance. The question becomes whether New York's Legislature, by enacting FOIL, has ceded Suffolk County's copyright.").

The Second Circuit Court of Appeals in *Suffolk County* determined that New York would assert copyright protection in its state records. *Id.* at 190. And in *Wisconsin v. Law Office Information Services,* 1999 WL 649235 (Wis. Ct. App. 1999), the Wisconsin State Court of Appeals determined that Wisconsin would enforce its copyright in its government records as well.[1]

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[1] Skinner's citation to this case, in which the Wisconsin Court of Appeals held that the state could enforce the copyright in the "material produced by the Revisor of Statutes to accompany the text of the statutes and administrative code in the official publications" (*Law*

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Through its unwavering history of broad enforcement of the public records law in the face of copyright challenges, a series of opinions directly on point from the Florida Attorney General, and finally, in the decision for which Skinner is seeking review, the state of Florida has provided unequivocally that a state agency or official may not assert copyright in government records unless the legislature has specifically provided therefor.

Once a state has determined that the copyright may not be asserted in its government records, there is no federal question. And thus there is no federal question here.

A. THE SECOND DISTRICT COURT OF APPEALS DID NOT MISCONSTRUE THE SIGNIFICANCE OF THE UNITED STATES DISTRICT COURT'S ORDER ON REMAND.

Skinner argues that the Second District Court of Appeal accorded undue significance to the order remanding this case to the circuit court. Pet. 6. The Second District only cited a single paragraph of the remand order prior to its independent determination that the question of Skinner's ability to assert copyright in the requested records was one of state law.

Office Information Systems, at *1), belies his repeated assertions that no other state court has ever addressed this issue. Pet. 4, 7. This case proves the fallacy of Skinner's jurisdictional arguments. Here, the copyright issue, which Skinner claims must be addressed in federal court only, was determined by a state court as ancillary to a breach of contract claim.

The single paragraph cited by the Second District was the Middle District's determination that this case arises under the Florida public records law and not the Copyright Act. Pet. 6a. Skinner complains that the Middle District reached this determination solely on the allegations of the complaint. Pet. 6. This is precisely what the Middle District was required to do – ascertain from the four corners of the complaint whether there was a federal question that required or permitted determination in the federal courts. *See generally* 17A JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶120.12[3][b] (3d ed. 2005). The Middle District found that the matter was one entirely of state law. Pet. 14a-15a.

Skinner argues that if the Middle District had the same information as the Second District Court of Appeal, it might have reached a different conclusion. Pet. 6. Specifically, Skinner complains that the Middle District "could not consider that Respondent withheld payment of the fee for the requested GIS data files, in order to bring this as a public records case . . . [or] that the public records at issue have already been provided . . . [rendering] the public records claim [] moot."[2] Pet. 7. Skinner asserts that these issues would have been relevant to the Middle District's decision because they render all issues moot except the determination of whether Skinner can assert copyright protection for works created by his office. Pet. 7. All of this information was irrelevant to the jurisdictional determination by the Middle District, as it is irrelevant to

[2] What MicroDecisions had was a disc purporting to contain the records and a personal use license that purported to take effect as soon as the disc was accessed. This was not access to the records and certainly did not moot the dispute between the parties.

this Court, because the ultimate determination of these issues is a question of state law.

To support his position, Skinner looks to the Second Circuit's decision in *Suffolk County*. Skinner asserts that the *Suffolk County* "decision certainly does not hold that a state court can decide whether a state or its subdivisions have authority to claim copyright." Pet. 7. This statement clarifies Skinner's fundamental misunderstanding of the division between state and federal authority with respect to this issue.[3] The *Suffolk County* court found that copyright subsists in state court records, but that thereafter, "[t]he question becomes whether New York's Legislature, by enacting FOIL, has ceded Suffolk County's copyright." *Suffolk County*, at 188. This is an explicit acknowledgment by the Second Circuit that the assertion of the subsisting copyright in state records is an issue exclusively of state law. When the Second Circuit analyzed the foregoing question, it did so under New York state law, a determination that could have well been made by a New York state court, as the decision under review was made in a Florida state court.

Skinner's position is that this is an issue of state law that can only be decided in federal court. The sheer illogic of this statement requires no counterargument.

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[3] Skinner's argument also establishes his fundamental misunderstanding of the distinction between the existence of the copyright in the records which vests automatically at the time of creation (17 U.S.C. §102) and the authority of Skinner as a government agent to assert the copyright. Skinner equates the existence of the copyright with a grant of authority to enforce it.

B. THE SECOND DISTRICT COURT OF APPEAL DID NOT MISCONSTRUE THE LAW CONTROLLING JURISDICTION OF THIS CASE.

Skinner argues that if the Second District had understood that the case was moot because MicroDecisions had the requested records, it would have realized that only the copyright issue remained and that it did not have subject matter jurisdiction over the copyright issue. Pet. 8-9. Even if the dispute over the requested records was moot, the copyright issue would still have properly been before the Second District because the determination regarding Skinner's authority to assert the copyright in public records is a question of state law. And, though one would not expect that it needs to be said, questions of state law may be decided by state courts.

Skinner attempts to use this mootness argument to dismiss *State Department of Health and Rehabilitative Services v. Southpointe Pharmacy*, 636 So. 2d 1377 (Fla. 1st DCA 1994). *Southpointe* is the only other Florida case in which a state agency has raised a copyright defense to a public records request. In *Southpointe*, the plaintiff brought suit for mandamus under the public records law to compel the department to provide a copy of a transcript of a hearing. *Id.* at 1378. The department raised the defense that providing a copy of the transcript would violate the court reporter's copyright. *Id.* at 1379. On the jurisdictional point, the court said the Florida circuit court had subject matter jurisdiction:

> A case arises under copyright law if a well-pleaded complaint establishes either that copyright law creates the cause of action or that the plaintiff's right to relief necessarily depends

> on resolution of a substantial question of copyright law, in that copyright law is a necessary element of one of the well-pleaded claims.
>
> The present case arises under the [public records law]. The amended petition notwithstanding, copyright law is not an essential element of Southpointe's claim. Again by analogy to federal-question jurisdiction, a copyright law defense ought not defeat state court jurisdiction even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case.

Id. at 1380 (citations omitted).

Southpointe is on all fours with the jurisdictional issue here. It has never been questioned by any Florida or other court, and Judge Steele cited it with approval in the remand order. Pet. 15a.

Skinner's ultimate confusion regarding the roles of federal and state law in determining the matter at hand is displayed by the conclusion to the jurisdictional argument:

> States may well have the authority to determine who among their government may claim entitlement to copyright protection for their works, which Florida has not done, but that does not grant a state court jurisdiction to decide who is entitled to hold a copyright.

Pet. 12. This statement blends a misunderstanding of the distinction between the subsisting copyright and Skinner's authority as a state official to enforce it and a misunderstanding of the role of state courts in interpreting state law. The copyright in the tax maps vests in the creator at the time the work is fixed in a tangible medium, but this

does not give Skinner the authority to enforce this copyright. Skinner may only be granted this authority by the state of Florida, which ***has*** made a determination regarding enforcement of the copyright in its government records. The determination is extant in the public records law which requires unfettered access and in the limited number of statutes which grant copyright protection to specific works of the state only. It has been explained in numerous opinions of the Florida Attorney General (Op. Fla. Att'y Gen. 2003-42; Op. Fla. Att'y Gen. 1988-23; Op. Fla. Att'y Gen. 1986-94) and it has been explained in the Second District Court of Appeal's decision in this case. The copyright vests at the time of creation and the state of Florida has determined that Skinner may not assert it against the public which is entitled to unfettered access to the records of its state agencies.

C. THE SECOND DISTRICT CORRECTLY DETERMINED THAT FLORIDA'S PUBLIC RECORDS LAW ABROGATES SKINNER'S COPYRIGHT CLAIM.

Skinner takes issue with the Second District Court of Appeal's ruling that "'[t]he Florida public records law . . . requires State and local agencies to make their records available to the public for the cost of reproduction. This mandate overrides a governmental agency's ability to claim a copyright in its work unless the legislature has expressly authorized a public records exemption.'" Pet. 12. Skinner argues that the Copyright Act preempts the states' ability to determine whether copyright may be asserted in state records.

Congress left it up to the states to determine the extent to which they would each avail of the copyright in

works created by their agencies. Though Congress explicitly denied copyright protection to works of the United States government (7 U.S.C. §105) it made no mention of the works of the state governments. "Works of state governments are therefore left available for copyright protection by the state or the individual author, *depending on state law and policy*, and 'subject to exceptions dictated by public policy with respect to such publications as statutes and judicial opinions.'" *Building Officials & Code Adm'rs Int'l, Inc. v. Code Tech, Inc.*, 628 F.2d 730, 735-36 (1st Cir. 1980) (quoting LATMAN, THE COPYRIGHT LAW 43 (5th ed. 1979)) (emphasis supplied). Nimmer agrees that this is a question "of state law itself." 1 MELVILLE AND DAVID NIMMER, NIMMER ON COPYRIGHT §5.14 (2005).

Skinner's arguments regarding preemption are therefore misplaced. Questions of preemption only arise when there is a tension or conflict between federal and state law. In the present case, the state is left to determine whether copyright may be enforced in its records. If the state determines that copyright may be enforced in its records, as Florida has with respect to a small number of its records, then the federal copyright law applies to those records. If, however, a state determines that copyright may not be asserted in its records, as Florida has with respect to most of its records, including the records at issue in this case, the copyright law has no application to those records and there is no tension between the federal and state law.[4]

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[4] The parties agree that *Suffolk County* and *Wisconsin v. Law Office Information Systems* are the only other cases in the country to have addressed the issue at stake in this case. Neither of these cases

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Florida has chosen to assert its subsisting copyright only selectively and to leave the vast majority of its records available for unfettered access by the public. For many years, the Florida Attorney General has consistently advised state officers that in the absence of express legislative authority they may not enforce copyright in records of their offices. *See generally* Op. Fla. Att'y Gen. 1988-23 and Op. Fla. Att'y Gen. 1986-94.

As recently as September 3, 2003, the Attorney General reiterated this advice. *See* Op. Fla. Att'y Gen. 2003-42, 2003 WL 22055615. This advisory opinion to the Palm Beach County Attorney advised that "in light of Florida's Public Records Law, Palm Beach County [a chartered home rule government] is not authorized to obtain copyright protection and require license agreements for its Geographic Information Systems (GIS) maps and related data in order to regulate and authorize redistribution of these materials for commercial use." *Id.* at *3. The force of this opinion as well as the opinions cited above applies fully to Skinner.

It is quite obvious that the legislature agrees with the Attorney General that its permission is needed in each specific case where an officer seeks to enforce a copyright. Thus for example, in 1990, the Legislature enacted the statute now found at FLA. STAT. ch. 119.084 (2002) which carefully distinguishes between "data processing software" and "data," and grants agencies limited authority "to acquire and hold copyrights for data processing software created by the agency and to enforce its rights pertaining

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mentions preemption because both clearly delineate the roles of federal and state law in the same manner as the decision under review.

to such copyrights." FLA. STAT. ch. 119.084(2) (2002). The statute does not authorize agencies to enforce copyright in the data itself and takes pains to assure that the agencies may not enforce data processing copyrights in such a manner as to impede public access to the data therein. FLA. STAT. ch. 119.084(2)(a) (2002).

Other statutes authorize specific agencies to claim copyright or other intellectual property rights in their work product, but the Legislature has been particular about who it authorizes to enforce copyright. *E.g.*, FLA. STAT. ch. 240.229 (2002) (universities). It has not authorized property appraisers to assert copyright in the tax maps. With Skinner's copyright ceded to the public, there is no federal law at issue and Skinner's extensive discussion of preemption is for naught.

II. THERE IS NO CONFLICT BETWEEN THE FLORIDA STATE COURTS AND THE SECOND CIRCUIT COURT OF APPEALS REGARDING COPYRIGHT IN STATE RECORDS.

Skinner argues that the decision offered for review is in conflict with the *Suffolk County* case from the Second Circuit Court of Appeals. While the factual issues presented in the instant case and *Suffolk County* are in fact similar, the legal interpretation of those facts is based on entirely separate bodies of state law as this case is governed by Florida state law and *Suffolk County* is governed by New York state law.

In *Suffolk County*, a home rule county of New York brought an infringement suit in the United States District Court against several companies which had acquired GIS maps from the county, aggregated them with maps of

other counties, and sold access to the resulting database to customers. *Suffolk County*, at 183. The county alleged that this infringed the county's copyright in these GIS maps.[5] *Id.*

When the defendants asserted that the State of New York's Freedom of Information Law ("FOIL") provided a complete defense, the Second Circuit agreed that this was a dispositive issue. *Id.* Although it is true that works of a subdivision of a state are eligible for copyright protection, the Second Circuit said, it is also true that "the New York State Legislature may enact laws that impact the property or affairs of local governments such as Suffolk County, especially on matters of state concern." *Id.* at 188 (citing, *inter alia*, *Williams v. Mayor of Baltimore*, 289 U.S. 36, 40 (1933)) (holding that subdivisions of states have no federally protected constitutional rights in property as against their state governments). The court then concluded:

> Thus, although a state and its subdivisions may own a copyright as a matter of copyright law, it may be that Suffolk County is not permitted to do so in this instance. The question becomes whether New York's Legislature by enacting FOIL has ceded Suffolk County's copyright.

Id.

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[5] *Suffolk County* brought a suit for infringement which genuinely arose under the Copyright Act because it had not created the access issue that Skinner created by insisting that the requester sign a license as a condition to gaining access to the records. That is how it came to be that *Suffolk County* ended up in a Federal court construing New York law whereas this case came through the state courts on a question of Florida law.

In the end, the court held that, as a matter of New York state law, FOIL did not abrogate the subsisting copyright because it required nothing more of an agency than that it make a single copy of a requested record available for copying by the public and did not prohibit assertion of copyright to restrict the requester's further use of the copy. *Id.* at 189.

Although *Suffolk County* does not control the outcome of this case, the cases are in accord with respect to the essential issue. *Suffolk County* holds that a state agency's ability to assert a copyright is determined not by federal law, but by state law.

A. THE SECOND CIRCUIT'S CONCLUSION THAT FOIL DOES NOT ABROGATE SUFFOLK COUNTY'S COPYRIGHT IS BASED ON THAT FEDERAL COURT'S INTERPRETATION OF NEW YORK STATE LAW.

In *Suffolk County* the determinative question of New York state law was much debated. The District Court initially held for the county and then reversed itself on rehearing. *County of Suffolk, New York v. Experian Information Solutions, Inc.*, 2000 WL 1010262 (S.D.N.Y. 2000) (county's suit for infringement dismissed for failure to state a claim on the ground that FOIL precluded such claim of copyright by a state agency). However, the Second Circuit concluded that the District Court was right on the state law issue the first time, held that FOIL did not abrogate the copyright, and reversed and remanded. *Suffolk County*, at 194.

The Second Circuit concluded that "FOIL provides only that '[e]ach agency shall, in accordance with its

published rules, make available for public inspection and copying all records' . . . " *Suffolk County*, at 188. The court concluded that "[i]t is one thing to read this provision to permit a member of the public to copy a public record, but it is quite another to read into it the right of a private entity to distribute commercially what it would otherwise, under copyright law, be unable to distribute." *Id.* at 189.

The court based this conclusion on two chief factors. First, it looked strictly at the language of the statute, which says only that, with respect to nonexempt records, "[e]ach agency shall, in accordance with its published rules, make available for public inspection and copying all records." *Id.* at 188 (quoting N.Y. Pub. Off. Law § 87(2) (McKinney Supp. 2001)). From this language and the absence of any further language, the court concluded that "the text of FOIL provides no clear indication" of an intent to abrogate the copyright. *Id.*

The court next emphasized that the statute is "silent as to what may occur after a state agency discloses its records." *Id.* at 189. The court found this silence important because "[w]hen the current version of FOIL was enacted in 1977, there was an established recognition that certain state entities could possess a copyright." *Id.* (citing, *inter alia*, Op. N.Y. Att'y Gen., 1973 WL 20304 (1973)). This led the court to its ultimate conclusion: "Because FOIL was enacted against such a baseline, yet did not specifically address its impact on a state agency's copyright, this silence is deafening." *Id.*

This parsimonious reading of the rights of the people of New York under FOIL is not binding on New York courts, and the day may come when a state court will adopt the opposite view of New Yorkers' rights under

FOIL. However, this is not a concern of this case, which is governed instead by Florida law.

B. THE PEOPLE OF FLORIDA HAVE RESERVED TO THEMSELVES THE UNFETTERED AND OVERRIDING "RIGHT TO COPY" AND THEREBY ABROGATED THE RIGHT OF THEIR STATE AGENCIES TO CLAIM COPYRIGHT IN THE ABSENCE OF A VALID STATUTE.

Florida's legal tradition of public access to the records of government is older, more robust, and more expansive than the Second Circuit's view of FOIL. Our first public records law was enacted in 1892, and during the one hundred and eleven years since then, the law has been clear that the right of access to records of government is an inherent attribute of citizenship under Florida government. *See Lorei v. Smith*, 464 So. 2d 1330, 1332 (Fla. 2nd DCA 1985), *review denied*, 475 So. 2d 695 (Fla. 1985) (recognizing that the "breadth of such right [of access] is virtually unfettered, save for the statutory exemptions").

Though the statutory right of access always was robust and well-nurtured by liberal judicial construction, the people ultimately found it appropriate to elevate this right to constitutional stature. FLA. CONST. art. I, §24. *See also Frankenmuth Ins. Co. v. Magaha*, 769 So. 2d 1012, 1021 (Fla. 2000) (explaining that the Sunshine Law "is of both constitutional and statutory dimension").

The Sunshine Amendment provides that "every person has the right to inspect or copy any public record . . . " FLA. CONST. art. I, §24(a). It further provides, "[t]his section shall be self-executing." FLA. CONST. art. I, §24(c). This

self-executing right of access elevated Florida's one hundred year-old legal tradition constituting the public right of access to records of government to constitutional stature. *See* Op. Fla. Att'y Gen. 1996-32 (explaining that "[t]he courts have recognized that Article I, section 24, Florida Constitution, has elevated to constitutional status the public's right to government in the sunshine that has previously been recognized by statute").[6]

In the Sunshine Amendment, the people reserved to themselves that same right which Skinner asserts here – the "right to copy." Our constitution states that "every person has the right to inspect and copy any public record." FLA. CONST. art. I, §24(a). This *public* right to copy is antithetical to the core right created by the Copyright Act: the owner's "*exclusive* right[] . . . to reproduce the copyrighted work in copies . . . " 17 U.S.C. §106(1) (emphasis supplied). Under Article I, Section 24(a) of the Florida Constitution, Skinner obviously does not have the "copyright" because he lacks the exclusive right to reproduce his records in copies. In Florida, therefore, it is not Skinner, but the people, who have the "right to copy."

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[6] *See also Monroe County v. Pigeon Key Historical Park, Inc.*, 647 So. 2d 857, 868 (Fla. 3rd DCA 1994) (explaining that "[t]he new Constitutional amendment does not create a new legal standard by which to judge Sunshine Law cases . . . [W]e find no reason to construe the amendment differently than the Supreme Court has construed the statute. *Accord, Zorc v. City of Vero Beach*, 722 So. 2d 891, 896 (Fla. 4th DCA 1998) (agreeing that "[t]he language in Article I, Section 24(b) of the Florida Constitution is virtually identical to that of section 286.011(1), Florida Statutes"); *Law and Information Services, Inc. v. City of Riviera Beach*, 670 So. 2d 1014, 1016 (Fla. 4th DCA 1996) (holding there is "no reason to construe the constitutional provision differently from the statute").

The right to copy is a self-executing right enumerated in the Declaration of Rights, (FLA. CONST. art. I, §24(a)), and the courts have long since foresworn any authority to read limitations or exemptions into the right, *Memorial Hospital-West Volusia, Inc. v. News-Journal Corp.*, 729 So. 2d 373, 380 (Fla. 1999) (holding that the constitution forbids courts to imply exemptions); *Wait v. Florida Power & Light Co.*, 372 So. 2d 420 (Fla. 1979) (holding that Chapter 119 forbids implication of exemptions). Only the legislature is authorized to curtail the constitutional right of access under the exacting constitutional standard. FLA. CONST. art. I, §24(c). *See also Halifax Hosp. Med. Ctr. v. News-Journal Corp.*, 724 So. 2d 567 (Fla. 1999). It follows that no authority short of a valid exemption adopted by the legislature could read into our constitutional right of access those limitations inferred by the Second Circuit in its construction of FOIL.

C. IF ADOPTED, SKINNER'S ARGUMENT WOULD DECIMATE FLORIDA PUBLIC RECORDS LAW.

Under Skinner's view of copyright in public records, virtually every public record made by officials, employees, and agents of the State of Florida would be protected by copyright. Thus, in the uncontrolled discretion of thousands of public officials around the state, citizens could be barred from obtaining copies unless they agreed to sign licenses controlling, and exacting fees for, subsequent use of copies. Granting Skinner his wish would turn Florida public records law on its head. As the facts of this case show, the exaction of a copyright license as a condition to access cannot be reconciled with settled public records law of Florida.

In Florida, a custodian of public records may not impose conditions on the requester other than those necessary for the preservation and protection of the records. *Tribune Company v. Cannella*, 458 So. 2d 1075 (Fla. 1984). A custodian may not require a citizen to conform her request to any formality, to justify or explain the reason for demanding access, or even to identify herself. *See generally Tedesco v. State*, 807 So. 2d 804, 806 (4th DCA 2002) (holding that "[t]here is no requirement that any person show a 'need' in order to obtain public records"); *Curry v. State*, 811 So. 2d 736, 741-42 (Fla. 4th DCA 2002) (holding that repeated requests for public records cannot be construed as "stalking" because "[a] citizen's request for public records also involves a 'legitimate purpose,' because the right to obtain the records is established by statute and acknowledged in the state constitution. . . . The motivation of the person seeking the records does not impact the person's right to see them under the Public Records Act"); *Staton v. McMillan*, 597 So. 2d 940, 941 (Fla. 1st DCA 1992) (holding that the state must give prisoner records of his prosecution because he "made proper requests for access which may be effectuated in accordance with [the public records law] and his reasons for seeking such access are immaterial"); *Bevan v. Wanicka*, 505 So. 2d 1116 (Fla. 2nd DCA 1987) (holding production of public records may not be conditioned upon a requirement that the person seeking inspection disclose background information about himself or herself); *News-Press Publishing Co. v. Gadd*, 388 So. 2d 276, 278 (Fla. 2nd DCA 1980) (quashing deposition to inquire into motive for seeking access "[b]ecause the newspaper's motives . . . are irrelevant in an action to compel compliance with the Public Records Act"); *Warden v. Bennett*, 340

So. 2d 977 (Fla. 2nd DCA 1976) (holding intended use of records irrelevant to right of access).

Additionally, by statute, the custodian may only rarely charge for providing access for inspection, (Op. Fla. Att'y Gen. 2000-11), and may charge only the actual cost of duplication of records. FLA. STAT. ch. 119.07(4) (2002).[7] *See Southpointe* at 1382. *See also* Op. Fla. Att'y Gen. 1985-3 (explaining that "[t]he provision of access to public records is a statutory duty imposed by the Legislature upon all records custodians and should not generally be considered a revenue-generating operation. . . ."). If Florida state officials were permitted to assert copyright against public records requests, a conflict would arise (as it did here) regarding the license fees that officials could charge for their copyright licenses and the fee that they are permitted to charge under the public records statute.

D. FLORIDA'S HISTORIC LEGAL TRADITION REGARDS THE PUBLIC RECORDS OF THE STATE AS COMMON PROPERTY.

The conclusion that Florida has abrogated the copyright in its public records need not rest solely on the ample force of the self-executing constitutional right to copy. It traces into this constitution through the unbroken history of Florida's public records law.

In construing FOIL, the Second Circuit was influenced by the fact that the New York Attorney General

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[7] "The custodian of public records shall furnish a copy or a certified copy of the record upon payment of the fee prescribed by law. If a fee is not prescribed by law, the following fees are authorized . . . the actual cost of duplication of the public record." FLA. STAT. ch. 119.07(4) (2002).

already had recognized that agencies could enforce copyrights in their works at the time FOIL was enacted and FOIL said nothing to the contrary. *Suffolk County*, at 189 (citing Op. N.Y. Att'y Gen., 1973 WL 20304 (1973)). In light of what it called that "baseline," the court said, FOIL's silence on the subject was "deafening." *Id.* Quite the opposite is true of Florida's public records law.

Florida's unique[8] tradition of open government is rooted in the Progressive Era's preoccupation with the interests of the common man and in distrust of government. Our first public records law was adopted in 1892 in the early stages of that era. This statute provided with respect to the records of the clerk that:

> Such records shall be always open to the public, under the supervision of the clerk, for the purpose of inspection thereof, and of making extracts therefrom; but the clerk shall not be required to perform any service in connection with such inspection or making of extracts without payment of the compensation fixed by law.

Id. (*quoted in State ex rel. Davis v. McMillan*, 38 So. 666, 667 (Fla. 1905)) ("*Davis*").

In 1905, this statute became the subject of the first case in the Florida Supreme Court involving the public

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[8] *See* DAVID R. COLBURN & LANCE DEHAVEN SMITH, GOVERNMENT IN THE SUNSHINE STATE: FLORIDA SINCE STATEHOOD 4 (1999) (noting that Florida has been "distinctive" in its approach to "Government in the Sunshine"); ROBERT J. HUCKSHORN, INTRODUCTION TO GOVERNMENT AND POLITICS IN FLORIDA 1, 7 (Robert J. Huckshorn, ed., 2d ed. 1998) ("Florida invented the concept of sunshine laws that require public officials to hold meetings in the open so that the public and the press may attend. The laws also opened all public documents and papers to public inspection.").

right of access to public records. The clerk of court in Escambia County fought against the right of access of a private company engaged in the business of purveying abstracts of title for profit. Like Skinner, the clerk argued that he had the "right to exclude the [abstractors] from examination of the records, and from making extracts therefrom, unless such [abstractors] shall pay him a large amount as his fees and remuneration for such inspection and extracting." *Id.* at 667. The Florida Supreme Court rejected that contention.

Construing this historic statute, the Florida Supreme Court said "Our statute imposes no . . . condition or limitation, but its language in the broadest terms declares that such records shall be always open, not to those members of the public only who may be presently or prospectively interested in some particular matter contained in such records, but 'to the public.'" *Id.* Moreover, the Court continued by recognizing that the public records of Florida are the common property of the people because it could conceive of no reason that would:

> warrant the exclusion of the person engaged in the lawful and highly useful enterprise of compiling an abbreviated abstract of the titles to all the different pieces of real estate in a county, aggregating therein in condensed and convenient form all the matter from all of such records that affects each individual parcel of such real estate. Such abstracts are great time and money savers to the public generally, and are at times quite remunerative to the compilers and owners thereof. . . .

Id.

In *State ex rel. Harris v. Wiecking*, 61 So. 125 (Fla. 1913), the Court underscored that public records are common property by holding that *Davis* is not limited to the contents of the Official Records Book. Rejecting a distinction attempted by the Pinellas clerk, the Court said that "an instrument becomes a part of the public records from the time it is filed with the clerk for record, it, from that time, becomes open to the public for inspection and to take extracts from, just as much so as though it were spread at length upon the record books kept by such clerk." *Id.*[9]

Under *Davis*, therefore, the public records of Florida belong "to the public" and not to the government. Thus, the public records are common property. It is not merely permissible, but laudable, that private businesses use this common property to create commercially valuable products which "are great time and money savers to the public generally, and are at times quite remunerative to the compilers and owners thereof." *Davis*, at 667. Like the early abstractors, MicroDecisions and other such businesses compile, add value, and purvey information from the corpus of public property lodged in the public records.

Although the common property doctrine of *Davis* has ancient roots, there is no doubt that it lives and thrives today. In *Booksmart Enterprises, Inc. v. Barnes & Noble College Bookstores*, 718 So. 2d 227 (Fla. 3rd DCA 1998), the court required Barnes & Noble, which it found to be

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[9] The 1892 statute applied only to clerks of courts, but in 1909 the legislature adopted the general public records law that is the direct predecessor of Chapter 119 today.

acting on behalf of the government,[10] to provide copies of certain records to its competitor. *Id.* at 229.

The case arose because Barnes & Noble acted as the college bookstore under contract with two state universities. *Id.* at 228. The instructors gave Barnes & Noble lists of required texts for the upcoming semesters so the store could stock these books for sale to students and instructors. *Id.* Booksmart, an off-campus competitor, requested copies of the completed forms from Barnes & Noble so that it too could stock the books and compete for student business. *Id.* Rejecting arguments based on the intended competitive use of the records, the court said that because the records were public records, "Barnes & Noble cannot deny anyone access to the completed forms." *Id.* at 229.

E. *DAVIS* IS THE "BASELINE" OF THE CONSTITUTIONAL RIGHT TO COPY.

Davis is part of the unbroken legal tradition that the people of Florida absorbed into their constitutional right of access. Whereas the Court in *Suffolk County* found significance in the fact that the New York Attorney General had created a "baseline" that permitted agencies to enforce copyrights before the 1977 passage of FOIL, the "baseline" of Florida's century old tradition of public access to public records is exactly to the contrary. Since 1905, *Davis* has never been questioned. It is the baseline that requires Florida courts to respect the public right to copy public records unfettered. Contrary, thus, to the Second Circuit's interpretation of FOIL, Florida public records law does

[10] *See* FLA. STAT. ch. §119.011(2) (2002) (private entity acting on behalf of government is agency for public records purposes).

concern itself with subsequent distribution of public records, and it always has.

CONCLUSION

Respondent respectfully requests that the Petition for Certiorari be denied.

Respectfully submitted,

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No. 05-383

NOV 2 - 2005

In The

Supreme Court of the United States

ABE SKINNER,

Petitioner,

v.

MICRODECISIONS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The District Court Of Appeal Of Florida, Second District

REPLY BRIEF

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REPLY TO BRIEF IN OPPOSITION

Responding to the Brief in Opposition is made immeasurably more difficult because it addresses a question not presented to the Court. The *only* question before the Court is, "Whether a state court has jurisdiction to decide whether a person who has a copyright registration issued by the United States Copyright Office is entitled to the protection afforded by that copyright." Respondent argues the public policy of its claim to the unfettered "right" to profit from reselling the maps of Collier County without reimbursing the taxpayers for a portion of the costs incurred to create those records, and discusses Florida's long tradition of open records, rather than addressing the question of whether the state appellate court ever had jurisdiction to decide the copyright issue. Congress has specifically negated that jurisdiction. 28 U.S.C. § 1338(a).[1] A state appellate court has now decided who may not claim entitlement to copyright protection, a substantive right created by the Copyright Act. *MicroDecisions, Inc. v. Skinner*, 889 So.2d 871, 874 (Fla. 2nd DCA 2004).

I. The Question Presented Is Important and Unsettled.

MicroDecisions does not dispute that its only grievance was the records that it received were copyrighted.

[1] "The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks. *Such jurisdiction shall be exclusive of the courts of the states in* patent, plant variety protection and *copyright cases*." (emphasis supplied) The Collier County circuit judge correctly found he lacked jurisdiction to determine the copyright issue raised by Respondent.

The only reason this case was brought was to rid the records of the copyright so that Respondent could sell GIS tax maps back to the very taxpayers who paid to create them in the first place. So, under the guise of seeking access to public records already in its possession, Respondent set out to invalidate a Certificate of Registration from the U.S. Copyright Office in a Florida state court.

The Copyright Office's grant of copyright protection, evidenced by the Certificate of Registration, is *prima facie* evidence of the validity of the copyright. 17 U.S.C. § 410(c); *Donald Frederick Evans v. Continental Homes, Inc.*, 785 F.2d 897, 903 (11th Cir. 1986). Florida's Second District Court of Appeal stands this rationale on its head, leaving the decision of whether or not a valid copyright exists up to state courts, based on a contrived and baseless claim of denial of access to public records. Respondent already possessed the subject records when the Complaint was served. Respondent's grievance is that it was not free to sell the records that it received, a right that is not guaranteed by the Florida public records law, which only guarantees access to and the right to copy records.

Respondent had to turn this into a public records case because the copyright issue has been settled in the federal courts, adversely to its position. See *County of Suffolk, New York v. First American Real Estate Solutions*, 261 F.3d 179 (2nd Cir. 2001) ("*First American*").

A. Respondent Misinterprets Applicable Law.

The Second District Court of Appeal specifically held that Petitioner lacked authority to claim copyright protection. *MicroDecisions,* 889 So.2d at 874. In so doing, the Second District clearly exceeded the limits of its jurisdiction. Respondents do not cite or discuss this actual holding

in the case, and with good reason. This is not a case about whether a writing is entitled to copyright protection, as has been addressed by one state court. See *Wisconsin v. Law Office Information Services,* 603 N.W.2d 748 (Table), 1999 WL 649235 (Wis. App. 1999) (unreported), *cited* in Brief in Opposition, pages 4, 11, fn. 1. As the Wisconsin court noted in that case, "[t]he existence of a copyright is a matter of federal law. LOIS cites no federal statute or case law that makes these state statutes relevant to whether a copyright exists. Therefore, we reject this argument as a basis for deciding the copyright issue." *Id.* The court decided the case on the basis of statutory interpretation and contract law, and did not invalidate a copyright in the process. *Id.* The present reported case goes to the heart of copyright law: what court may answer the question of who may and may not claim entitlement to copyright protection.

Contrary to Respondent's assertions at page 3 of the Brief in Opposition, many Florida public officials and agencies routinely copyright works that fit the definition of public records, without specific statutory authority to do so. Even the Second District Court of Appeal that decided this case copyrights its own web page on the Internet.[2] Due to the fact that no entrepreneurs have found a way to make money by selling copies of that web page, that particular claim of copyright has not yet been judicially tested.

State law does not govern application of federal copyright law. "[F]ederal statutes are generally intended to have uniform nationwide application." *Mississippi Band*

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[2] See http://www.2dca.org.

of Choctaw Indians v. Holyfield, 490 U.S. 30, 43, 109 S.Ct. 1597, 1605, 104 L.Ed.2d 29 (1989). "We start . . . with the general assumption that 'in the absence of a plain indication to the contrary, . . . Congress when it enacts a statute is not making the application of the federal act dependent on state law.'" *Choctaw Indians,* 490 U.S. at 43, 109 S.Ct. at 1605 (citations omitted). "Accordingly, the cases in which we have found that Congress intended a state-law definition of a statutory term have often been those where uniformity clearly was not intended." *Choctaw Indians,* 490 U.S. at 1606, 109 S.Ct. at 44, *referencing Reconstruction Finance Corporation v. Beaver County*, 328 U.S. 204, 209, 66 S.Ct. 992, 995, 90 L.Ed. 1172 (1946) (statute permitting states to apply their diverse local tax laws to real property of certain Government corporations).

This Court applies this rationale to copyright cases. See *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 109 S.Ct. 2166, 104 L.Ed.2d 811 (1989) ("*CCNV*"). *CCNV* began as a dispute between an artist and the organization that hired him, over ownership of a copyright for a sculpture. The case turned on the work for hire doctrine, and whether the artist was an independent contractor or an employee. Settling the issue of whether states control issues of federal copyright law, this Court noted, "[e]stablishment of a federal rule of agency, rather than reliance on state agency law, is particularly appropriate here given the act's express objective of creating national, uniform copyright law by broadly pre-empting state statutory and common-law copyright regulation." *Id. citing* 17 U.S.C. § 301(a). Section 301 explicitly preempts all claims that are covered under § 106 of the Act, if they come within the subject matter of §§ 102 and 103. Respondent would overturn this Court's ruling by allowing

differing results for the artist in *CCNV*, depending on whether he was located in Florida or in New York, based on state law. This is precisely what section 301 of the Copyright Act sought to avoid. See also *Storer Cable Communications v. City of Montgomery*, 806 F.Supp. 1518, 1536 (M.D. Ala. 1992) (noting that "local authorities, under the guise of trade regulation, cannot enact laws which go beyond the restriction of anti-competitive practices and target and extinguish one or more of the exclusive rights granted under § 106. . . . If this were not so, states could effectively extinguish copyright rights with their police power, a result which would surely frustrate the copyright scheme." (internal citation omitted)).

B. Respondent Avoids the Policy Behind the Copyright Act.

"Section 301(a) of the Copyright Act accomplishes the general federal policy of creating a uniform method for protecting and enforcing certain rights in intellectual property by preempting other claims." *Daboub v. Gibbons*, 42 F.3d 285, 288 (5th Cir. 1995). This policy is made crystal clear by the Notes of Committee on the Judiciary, House Report No. 94-1476, discussing section 301(a) of the Copyright Act and its promotion of uniformity of application rather than willy nilly application according to the whims of various state courts.

Daboub, supra, puts this policy into practice, and is analogous to the present case. In *Daboub*, a musical group, "the Nightcaps" sought to bring what was essentially a copyright infringement case against the musical group "ZZ Top," couching their claim in terms of tort. *Id.* at 287. The Nightcaps recorded, released, and performed a song in the

1950's, but never applied for a copyright. In 1975, ZZ Top released a version of the same song that it admitted was lyrically and musically identical, and copyrighted the song. The Nightcaps' action is analogous to Respondent couching its claims in terms of public records law, seeking to invalidate Petitioner's copyright certificate. As the Fifth Circuit noted: "The Nightcaps sing a chorus of state and federal law theories in their attempt to escape the grasp of the Copyright Act's preemption provision, 17 U.S.C. § 301(a). The Copyright Act expressly preempts all causes of action falling within its scope, with few exceptions." *Id.*

The determination of whether a cause of action is preempted under section 301(a) is made via a two-part test. *Id.* at 289. "First, the cause of action is examined to determine if it falls within the subject matter of copyright." *Id.* "Second, the cause of action is examined to determine if it protects rights that are 'equivalent' to any of the exclusive rights of a federal copyright, as provided in 17 U.S.C. § 106." *Id.* The focus in *Daboub* was on the "equivalency" determination. The Nightcaps argued that the state law conversion claims were not equivalent to a cause of action sounding in copyright. The Fifth Circuit noted that "[t]he core of each of these state law theories of recovery in this case, without detailing the specific elements comprising each claim, is the same: the wrongful copying, distribution, and performance of the lyrics of [the song]." *Id.* The Fifth Circuit roundly denounced the Nightcaps' attempt to circumvent the Copyright Act, noting: "In effect, the Nightcaps have attempted to avoid the Copyright Act by presenting as many state law causes of action to the court as possible. The Nightcaps' argument is like a ventriloquist's attempt to present a copyright action in the voice of state law claims. However, if the language of the

act could be so easily circumvented, the preemption provision would be useless, and the policies behind a uniform Copyright statute would be silenced." *Id.* at 290.

The same holds true with the present case. Despite having couched the Complaint as a writ of mandamus seeking to compel production of public records, Respondent's sole grievance is that Petitioner holds a Certificate of Copyright for the records it received, and Respondent claimed that because it could not copy, resell, copy, resell *ad infinitum*, that it was denied access to the public records already in its possession. The right to copy is one of the rights enumerated in section 106 of the Copyright Act. The only substantive remedy Respondent sought was a declaration that Petitioner could not, as a matter of Florida law, hold a Certificate of Copyright, a right granted by the Copyright Act. Just as the Nightcaps did, Respondent attempts an end-run around section 301(a) of the Copyright Act by claiming that this is a public records case.

Respondent would no doubt prefer that there be no preemption provision in the Copyright Act. The fact remains that section 301 bars state law claims about subject matter within the general scope of copyright that are equivalent to copyright claims. In this case, the subject matter at issue is ownership of the copyright itself, a right directly provided by the Copyright Act, not an equivalent right. Nevertheless, the Second District Court of Appeal maintained jurisdiction and held that the Petitioner was not entitled to claim copyright protection. Preemption certainly does apply to this case.

II. A Genuine and Acknowledged Conflict Exists Between Florida State Courts and the Second Circuit.

One of the fundamental purposes behind the copyright clause of the Constitution, as shown in Madison's comments in *The Federalist*, was to promote national uniformity and to avoid the practical difficulties of determining and enforcing an author's rights under the differing laws and in the separate courts of the various States. Today, when the methods for dissemination of an author's work are incomparably broader and faster than they were in 1789, national uniformity in copyright protection is even more essential than it was then to carry out the constitutional intent. Notes of Committee on the Judiciary, House Report No. 94-1476. If it is allowed to stand, the decision of Florida's Second District Court of Appeal renouncing the holding of the Second Circuit in *First American* will result in an author finding differing copyright protection depending on whether he created his work in Florida or New York.

Respondent's assertion that Florida's tradition of access to public records is older, more robust and more expansive than the Second Circuit's view of New York's Public Records Law ("FOIL") is akin to Ko-Ko's assertion in *The Mikado* about the flowers that bloom in the spring, tra la. Both have nothing to do with the case. Just because the Second Circuit declined to engage in legislating from the bench by adding the right to sell records to a statute that did not contain such a right does not mean that the Second Circuit applied a narrow standard.

New York's FOIL is as broad as Florida's public records law. "The Freedom of Information Law makes government records presumptively available to the public without regard to the status, need, good faith or purpose of